Case note

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CYONARA SNOWFOX – UNUSUAL ARGUMENTS ABOUT ORDINARY TRANSACTIONS

In the Full Federal Court case of *Cyonara Snowfox Pty Ltd v Commissioner of Taxation* [2012] FCAFC 177 delivered on 4 December 2012, the taxpayer unsuccessfully sought to apply the margin scheme provisions and the going concern provisions to ordinary sales of subdivided land made by the taxpayer to various registered purchasers. The taxpayer also argued, unsuccessfully, that a notice of amended assessment issued by the Commissioner was not a valid notification for the purposes of stopping the clock on the statutory time period for recovery of underpaid tax under the taxation administration laws. The taxpayer was unsuccessful in the two Administrative Appeals Tribunal (AAT) cases ([2010] AATA 137 and [2011] AATA 124 decided on 24 February 2010 and 25 February 2011, respectively) and also before the Full Court of the Federal Court of Australia where the taxpayer's appeal was unanimously dismissed. The taxpayer, unperturbed by these setbacks, is applying for special leave to appeal to the High Court of Australia.

The *Cyonara Snowfox* case is significant because it demonstrates that GST litigation matters increasingly involve disputes with respect to both substantive tax issues and tax administration laws, the latter being often overlooked by many taxpayers. This combination is usually complex enough; however, *Cyonara Snowfox* is especially interesting because the Full Federal Court additionally provided helpful commentary on the processes involved in having a matter heard and decided in the AAT and then appealed to the Federal Court. This included a discussion of how the evidentiary burden must be discharged by the taxpayer, the principles of evidence that should be taken into account (notwithstanding that the AAT is not bound by the rules of evidence) and the distinction between matters of fact and law that must be taken into account in considering whether it is appropriate to appeal an AAT decision to the Federal Court.

It should be stated at the outset, that the circumstances of the case and the arguments put forward by the taxpayer were very unusual. In respect of the application of the margin scheme under Div 75,[1] for example, the taxpayer argued that it was entitled to make the decision to apply the margin scheme some two years and eight months after the relevant supply took place. In arguing that the supply was a GST-free supply of a going concern under s 38-325, the taxpayer claimed that the relevant lot had been leased to itself by the would-be purchaser just prior to its sale of the lot to the purchaser having been completed. In respect of the notice of assessment, the taxpayer argued, amongst other things, that if a taxpayer's liability to pay indirect taxes did not depend on, and was in no way affected by, the making of an assessment (see s 105-15 of Sch 1 to the *Taxation Administration Act 1953* (Cth) (TAA)), then a notice of assessment could not have the effect of preventing the time limit on recovery by the Commissioner from expiring under s 105-50 of Sch 1 to the TAA.

THE FACTS

Cyonara Snowfox Pty Ltd acquired a parcel of land in 1997 (prior to the introduction of the GST), which it subsequently subdivided into a number of allotments, the sale of five of which came under scrutiny (Lots 1, 6, 9 and 10 of SP150819 and Lot 8 of SP131663). Some relevant details of the transactions are set out in Table 1.

[1] All references to Divisions and sections are to Divisions and sections of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth), also referred to as the GST Act, unless otherwise stated.

TABLE 1

Lot	Date of settlement	Purchaser registered for GST	Margin scheme applied at time of settlement	GST payable by purchaser at settlement	GST emitted to Commissioner by taxpayer
1	September 2004	Yes	No	Yes	No
6	January 2006	Yes	No	Unknown	Yes
9	November 2004	Yes	No	Yes	Yes
10	October 2006	Yes	No	Yes	No
8	December 2005	Registered 1 Jan 2006	No Contract indicated "sale of going concern" but a tax invoice issued on 31 March 2007 required purchaser to pay GST.	Yes	No

The taxpayer also acquired a parcel of land – "Lot 202 on SP161001" – in December 2005. While the GST consequences of that acquisition were ultimately not determined by the AAT (as the Commissioner conceded that the taxpayer was entitled to claim the input tax credits), the fact of the GST consequences of this acquisition having been in dispute is relevant to the question of whether the notice of assessment was a valid notification (discussed below).

The Commissioner conducted an audit of the taxpayer's tax affairs, including in respect of the transactions above. In May 2007, the Commissioner notified the taxpayer of the results of the audit by way of letter. These are set out at [22] of the AAT's decision in *Cyonara Snowfox Pty Ltd and Commissioner of Taxation* (2011) 80 ATR 225; [2011] AATA 124 (Second Tribunal Decision) as follows:

> The Commissioner:
> - increased the GST payable for the September 2004 quarter from nil to $150,543 to bring into account GST on the sale of Lot 1 on SP150819,
> - increased the GST payable for the month of November 2004 from $150,000 to $151,778 to bring into account the adjusted sale price (rather that the contract price) of Lot 9 on SP150819
> - increased the GST payable for December 2005 from nil to $370,299 to bring into account GST on the sale of Lot 8 on SP131633. The Commissioner did not accept the sale of Lot 8 to be a supply of a going concern.
> - decreased the GST payable for January 2006 from $220,561 to $215,561 to adjust for the price reduction of $50,000 on Lot 6 of SP150819
> - increased the GST payable for October 2006 from nil to $102,481 to bring into account GST on the sale of Lot 10, and
> - reduced the input tax credits for the February 2007 from $313,892 to nil on the basis that the Commissioner did not accept that Cyonara was entitled to claim input tax credits on the acquisition of Lot 202.

The Commissioner issued a notice of assessment on 24 May 2007 reflecting these outcomes (Notice of Assessment). He also issued a penalties assessment on 25 May 2007 imposing penalties in respect of the taxpayer's treatment of Lot 1 (September 2004, 50% penalties reduced by 20%) and Lot 10 (October 2006, 50% penalties reduced by 20% and then remitted by 50%). The Commissioner disallowed the taxpayer's objections in relation to the substantive assessment and penalties.

THE TAXPAYER'S ARGUMENTS AND EVIDENCE

The taxpayer's approach can be summarised as follows:

1. The taxpayer sought to apply the margin scheme in respect of Lots 1 and 9, arguing that under the margin scheme provisions at that time (which apply to supplies made before 17 March 2005), the choice to use the margin scheme could be made at any time in the course of "working out" the GST liability, including at the point in time at which the GST liability is worked out by the AAT (which, in this case, was well over two years after the supply took place).
2. The taxpayer argued that the sale of Lot 8 was a GST-free supply of a going concern and that the relevant enterprise was a leasing enterprise. A lease to the taxpayer had been "granted" by the purchaser on 6 December 2005, notwithstanding that title to the property did not pass to the purchaser until 7 December 2005.The taxpayer argued that a number of other leases had been granted over the property beforehand.
3. The statutory time limit on recovery by the Commissioner prevented the Commissioner from recovering any of the GST that the Commissioner contended was payable in relation to Lots 1, 8, 9 and 10.

These arguments are explored in further detail below.

Margin scheme

The margin scheme provisions at the relevant time stated the following:

751 What this Division is about

> This Division allows you to use a margin scheme to bring within the GST system your taxable supplies of freehold interests in land, of stratum units and of longterm leases.

755 Choosing to apply the margin scheme

(1) If you make a taxable supply of real property by:
  (a) selling a freehold interest in land; or
  (b) selling a stratum unit; or
  (c) granting or selling a longterm lease;

you may choose to apply the margin scheme in working out the amount of GST on the supply.

(2) However, you cannot choose to apply the margin scheme if you acquired the freehold interest, stratum unit or longterm lease through a taxable supply on which the GST was worked out without applying the margin scheme.

These provisions continue to apply in respect of supplies that took place prior to 17 March 2005.[2]

The taxpayer argued that there was nothing in s 75-5 that required the supplier to choose to apply the margin scheme prior to the supply taking place. Further, the taxpayer argued that the choice to apply the margin scheme could be made after the period in which any GST was payable in relation to the supply if, for example, the supply had been treated as taxable at the time the transaction was entered into (as was the case here, at least insofar as GST was collected from the purchasers at settlement, if not always remitted to the Commissioner).

The AAT, on the taxpayer's view, was engaged in "working out the amount of GST on the supply" within the terms of s 75-5, as a consequence of the Commissioner having issued the Notice of Assessment. Consequently, the taxpayer considered it was open to it to apply the margin scheme in respect of Lots 1 and 9 in the course of the proceedings before the AAT.[3]

GST-free supply of a going concern

Section 38-325 of the GST Act provides the following:

(1) The supply of a going concern is ***GST free*** if:
  (a) the supply is for consideration; and
  (b) the recipient is registered or required to be registered; and
  (c) the supplier and the recipient have agreed in writing that the supply is of a going concern.

(2) A ***supply of a going concern*** is a supply under an arrangement under which:

[2] The *Tax Laws Amendment (2005 Measures No 2) Act 2005* (Cth) amended Div 75 for supplies made on or after 17 March 2005.

[3] *Cyonara Snowfox Pty Ltd and Commissioner of Taxation* (2011) 80 ATR 225; [2011] AATA 124 at [31].

(a) the supplier supplies to the recipient all of the things that are necessary for the continued operation of an enterprise; and

(b) the supplier carries on, or will carry on, the enterprise until the day of the supply (whether or not as a part of a larger enterprise carried on by the supplier).

The taxpayer argued that an enterprise of leasing had been carried on in relation to Lot 8. Specifically, the taxpayer gave evidence with respect to the following leases that had been granted in December 2003 to Swiss Group entities, and later in 2004 to Solartech Solutions Pty Ltd. Both of the leases were terminated for breaches. Oral evidence was given by Mr Smits, a director and shareholder of the taxpayer. The following is a summary of the evidence provided.

With respect to the lease to Swiss Group entities, Mr Smits claimed that the Swiss Group entities were controlled by a fraudster who "defaulted entirely upon the monetary covenants and were ejected from the premises". No evidence was provided to the AAT that the leases were registered, but one poorly copied, unstamped and unregistered lease (of three) was provided.[4] This appeared to be a lease for a term of nine years of "Shop 2/B" within Lot 8.

With respect to the lease to Solartech, Mr Smits said that Solartech executed a lease in registrable form for a term of seven years commencing on 1 July 2004 and remained in possession until December 2005. No rent whatsoever was paid to the taxpayer. The controlling mind and guarantor of Solartech's obligations, Mr Hastings, became bankrupt. The only steps taken to enforce Solartech's obligations were to send an email to Mr Hastings on 30 September 2004 requesting that the premises be vacated and the issuing of a statutory notice to remedy breach to Solartech in December 2004.[5] Mr Smits told the AAT that he put up with the defaulting tenant because it provided security for the premises, there were no alternative tenants and he hoped that he would eventually receive money under the guarantee.[6]

The lease to Solartech was not registered. Mr Smits claimed that a copy of the executed lease was not provided because it was retained unlawfully by the taxpayer's solicitor, with whom the taxpayer was engaged in a dispute. The taxpayer did not request that the AAT issue a summons to the solicitor requiring him to give evidence or to produce the document.

The only documentary evidence of the lease to Solartech was an email from the solicitor to a property valuer that stated that the solicitor was in possession of the lease executed by both lessee and lessor and a letter from the valuer referring to the firm having been provided with a copy of the lease. The letter did not specify whether the valuer was in possession of an executed copy of the lease.

The taxpayer provided the AAT with a copy of the sale contract with respect to Lot 8, which was dated 18 October 2005 and which indicated that the sale to 3435 Pacific Highway Pty Ltd was due for completion on 7 December 2005. The contract stated that the sale was a GST-free supply of a going concern.[7] Annexed to the contract was an unexecuted lease between Lyndall Eve Smouha (the controlling mind of 3435 Pacific Highway Pty Ltd) and the taxpayer. The commencement date on the lease was 6 December 2005 and the expiration date was 7 December 2007.[8] No lease was registered and the taxpayer did not provide an executed copy to the Commissioner or the AAT.

The draft lease, at cl 18, required the taxpayer to provide a bank guarantee of two years rent plus GST. Curiously, another document – a guarantee executed by Ms Smouha as guarantor for the obligations of 3435 Pacific Highway Pty Ltd – recited that Special Condition 1 of the contract of sale required the taxpayer to provide an unconditional bank guarantee. This was not the effect of Condition

[4] *Cyonara Snowfox Pty Ltd and Commissioner of Taxation* (2011) 80 ATR 225; [2011] AATA 124 at [47].

[5] *Cyonara Snowfox Pty Ltd and Commissioner of Taxation* (2011) 80 ATR 225; [2011] AATA 124 at [52].

[6] *Cyonara Snowfox Pty Ltd and Commissioner of Taxation* (2011) 80 ATR 225; [2011] AATA 124 at [53].

[7] *Cyonara Snowfox Pty Ltd and Commissioner of Taxation* (2011) 80 ATR 225; [2011] AATA 124 at [54].

[8] *Cyonara Snowfox Pty Ltd and Commissioner of Taxation* (2011) 80 ATR 225; [2011] AATA 124 at [55]-[57].

1 of the contract of sale in evidence before the AAT. While this had no bearing on the analysis, these discrepancies raised some doubt on the part of the AAT as to whether the contract in evidence was in fact the operative document.[9]

Time limit on recovery by the Commissioner

Section 105-50 of Sch 1 to the TAA imposes a statutory time limit of four years in which the Commissioner can recover unpaid GST, unless, within those four years, the Commissioner has given a notice to the taxpayer requiring payment of the amount. The section relevantly states as follows:

> (1) Any unpaid net amount, net fuel amount or amount of indirect tax (together with any relevant general interest charge under this Act) ceases to be payable 4 years after it became payable by you.
>
> ...
>
> (3) However, subsection (1) does not apply to an amount… if:
>
> (a) within those 4 years the Commissioner has required payment of the amount… by giving a notice to you; or
>
> (b) the Commissioner is satisfied that:
>
> (i) the payment of the amount was avoided by fraud or evaded…

The taxpayer argued in two separate proceedings before the AAT that the notice of assessment was not a "notice" for the purposes of s 105-50(3)(a). In the first proceedings, *Cyonara Snowfox Pty Ltd and Commissioner of Taxation* (2010) 78 ATR 632; [2010] AATA 137 (First Tribunal Decision), the taxpayer argued that the Notice of Assessment could not constitute a notice for the purposes of s 105-50 because of the operation of s 105-15, which states the following:

> **105-15 Indirect tax liabilities do not depend on assessment**
>
> (1) Your liability to pay indirect tax or a net fuel amount, and the time by which a net amount, a net fuel amount or an amount of indirect tax must be paid, do not depend on, and are not in any way affected by, the making of an assessment under this Subdivision.
>
> (2) …
>
> Note: However, a notice of assessment can be used as evidence of liability: see section 105-100.

The essence of the taxpayer's argument was that, if the notice of assessment was to constitute a notice for the purpose of s 105-50, thereby allowing the Commissioner to recover GST beyond the four year statutory time period, then the liability to pay GST *would* be affected by the making of an assessment, contrary to the terms of s 105-15.[10]

Further, the taxpayer argued that the Notice of Assessment was not a notice requiring payment within the terms of s 105-50, as the "primary… purpose" of and the "dominant work done by" the Notice of Assessment was to convey to the taxpayer the assessment decision and to inform the taxpayer of its rights to object.[11] The taxpayer's conclusion was based on the following factors, set out at [16] of the First Tribunal Decision:

> (a) the absence of any reference to, or stated reliance on, s 105-50;
>
> (b) the absence of any requirement to pay on demand or at some specified date in the future;
>
> (c) the fact that the notice is not described as a notice of demand and is not expressed in the language of demand;
>
> (d) the fact that the Commissioner can rely upon the notice of assessment to evidence liability;
>
> (e) the fact that the notice deals with debts that are not the subject of the notice;
>
> (f) that the notice leaves the recipient to speculate about what payment is demanded by the creditor;
>
> (g) that the form of the notice of assessment is quite different to the shortfall penalty assessment made and served at the same time which demands payment by a specified date and details ways in which that payment can be made.

In the second proceedings decided by the Second Tribunal Decision the taxpayer agued that the Notice of Assessment was not a valid notice because the GST amount that the Commissioner sought to

[9] *Cyonara Snowfox Pty Ltd and Commissioner of Taxation* (2011) 80 ATR 225; [2011] AATA 124 at [58].

[10] *Cyonara Snowfox Pty Ltd and Commissioner of Taxation* (2010) 78 ATR 632; [2010] AATA 137 at [27].

[11] *Cyonara Snowfox Pty Ltd and Commissioner of Taxation* (2010) 78 ATR 632; [2010] AATA 137 at [16].

recover was incorrect.[12] This argument arose as a consequence of the Commissioner conceding that the taxpayer was entitled to claim input tax credits in respect of its acquisition of "Lot 202" in 2005. At the time of the Notice of Assessment, the Commissioner had denied the credits claimed by the taxpayer, as reflected in the amount of GST payable under the notice. The taxpayer referred to, amongst other cases, bankruptcy cases (*Walsh v Deputy Commissioner of Taxation* (1984) 156 CLR 337; *Re Greenhill, ex p Myer (NSW) Ltd* (1984) 5 FCR 84) in which demands for payment were disputed in circumstances where the notices overstated the amounts payable.[13]

Taxpayer's evidence

The taxpayer's evidence was provided orally by Mr Smits, who described himself as "the controlling mind", "a director and minority shareholder" of the company.[14] There was a notable lack of documentary evidence provided to the AAT by the taxpayer. The contracts of sale in respect of Lots 1 and 9 were not produced. As noted above, no registered leases were produced in relation to Lot 8.

THE COMMISSIONER'S ARGUMENTS

The Commissioner's arguments were not set out in great detail in any of the decisions, but can be summarised as follows:

1. The taxpayer must have chosen to apply the margin scheme in respect of Lots 1 and 9 at or before the time it made the relevant supplies – namely, at or prior to settlement.[15]
2. The supply of Lot 8 did not, as a matter of fact, meet the requirements set out in s 38-325 for a GST-free supply of a going concern.

The Notice of Assessment was a valid notice for the purposes of s 105-50 of Sch 1 to the TAA and consequently, the statutory time period for recovering the GST had not expired.

FIRST TRIBUNAL DECISION

As noted above, the First Tribunal Decision addressed, as a preliminary matter, whether the Notice of Assessment was a notice for the purpose of s 105-50 of Sch 1 to the TAA or whether treating it as such would be contrary to s 105-15 of Sch 1 to the TAA, which states that the liability to pay GST does not depend on, and is not affected by, a notice of assessment. The AAT noted that this issue was not part of the taxpayer's grounds of objection; however, the Commissioner did not oppose amending the grounds so that the issue could be determined.

The AAT opened with pointed criticism of the Commissioner, in terms of the lateness of his written submissions and his failure to comply with the administrative requirement to assist the tribunal.[16] Deputy President Hack of the AAT stated, as follows:

> At the outset I should record that Cyonara, helpfully, lodged its written submissions, and provided them to the Commissioner, in advance of the hearing. The practice is to be commended. Counsel for the Commissioner was not so helpful. The Commissioner's submissions, which were dated two days prior to the hearing, were provided to the Tribunal and to Mr Pitman, the solicitor for Cyonara, part way through the Commissioner's oral submissions and after Mr Pitman had advanced his oral argument. That practice is to be deprecated, *a fortiori* where it is engaged in by the party having a statutory duty to assist the Tribunal.[17]

However, beyond these comments, and the fact that the taxpayer's arguments had, in the words of the AAT, an "attractive simplicity",[18] the taxpayer was unsuccessful. The AAT found that, while

[12] *Cyonara Snowfox Pty Ltd and Commissioner of Taxation* (2011) 80 ATR 225; [2011] AATA 124 at [85].

[13] *Cyonara Snowfox Pty Ltd and Commissioner of Taxation* (2011) 80 ATR 225; [2011] AATA 124 at [86].

[14] *Cyonara Snowfox Pty Ltd v Commissioner of Taxation* [2012] FCAFC 177 at [5].

[15] *Cyonara Snowfox Pty Ltd and Commissioner of Taxation* (2011) 80 ATR 225; [2011] AATA 124 at [32].

[16] *Administrative Appeals Tribunal Act 1975* (Cth), s 33(1AA).

[17] *Cyonara Snowfox Pty Ltd and Commissioner of Taxation* (2010) 78 ATR 632; [2010] AATA 137 at [3].

[18] *Cyonara Snowfox Pty Ltd and Commissioner of Taxation* (2010) 78 ATR 632; [2010] AATA 137 at [27].

s 105-15 provides that a liability to pay GST is not dependent on, and not affected by, the making of an assessment, the same cannot be said of a *notice of assessment*. The AAT stated at [28]-[29] in the First Tribunal Decision, as follows:

> I am unable to accept the argument despite its simplicity. The flaw in the argument is that it fails to recognise the necessary distinction between an assessment and a notice of assessment. Contrary to the submissions of Cyonara, that distinction is not "artificial or technical without merit". It is a time-honoured distinction drawn as long ago as 1926 when Sir Isaac Isaacs said in *R v Deputy Federal Commissioner of Taxation (S.A.)* [(1926) 37 CLR 368 at 372-373]:
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> > Before indicating in detail the successive provisions of the Act, one general deduction from those provisions may be stated, a deduction possibly obvious, but very necessary to remember. It is as to the nature of an assessment. An "assessment" is not a piece of paper: it is an official act or operation; it is the Commissioner's ascertainment, on consideration of all relevant circumstances, including sometimes his own opinion, of the amount of tax chargeable to a given taxpayer. When he has completed his ascertainment of the amount, he sends by post a notification thereof called "a notice of assessment."
>
> The form of legislation has changed but the fundamental concept of the Commissioner making an assessment remains in s 105-5 of Schedule 1 to the TAA…

Further, the AAT concluded that while a notice of assessment may have the effect of conveying the Commissioner's conclusions to the taxpayer, this does not preclude it from being a notice within the terms of s 105-50, especially in circumstances where that section sets out no specific requirements as to what a notice must contain in order to meet that description, other than to require payment of the amount. In this regard, the AAT stated:

> It can be expected that where an assessment has been made the Commissioner has a different view to that of the taxpayer on the question of the taxpayer's liability to GST from a transaction or transactions. The notice of assessment then performs the function of articulating the Commissioner's view of the taxpayer's liability to GST from the transaction or transactions. And, given that there are mechanisms that allow the taxpayer to contest the Commissioner's view of liability, the notice of assessment performs the function of informing the taxpayer of the fact of those mechanisms.
>
> These matters, it may be accepted, are the primary functions of the notice of assessment. But that does not, in my view, prevent the notice of assessment from performing the role of notice requiring payment providing it does otherwise meet that description. There is nothing in s 105-50(3) of Schedule 1 to the TAA Act that would suggest a notice under that sub-section would be invalid were it to perform any other function. Moreover there is nothing in the sub-section that would require any particular form, or any particular form of words, or that reference to be made to the statutory power relied upon…[19]

Consequently, the taxpayer was unsuccessful in arguing that the statutory time period for recovering GST had expired. However, as noted above, the argument was revived in the subsequent AAT proceedings on different grounds.

SECOND TRIBUNAL DECISION

In the Second Tribunal Decision, the AAT set out its reasons for dismissing the arguments of the taxpayer in respect of the application of the margin scheme to Lots 1 and 9 and the treatment of Lot 8 as a GST-free supply of a going concern. Also, the AAT dealt with the taxpayer's arguments in respect of the invalidity of the Notice of Assessment as a "notice" for the purposes of s 105-50 of Sch 1 to the TAA. The reasons are discussed below.

Margin scheme

The AAT rejected the taxpayer's contention that, under the terms of s 75-5 of the GST Act, the taxpayer could choose to apply the margin scheme at any time in "working out" the amount of GST payable, including in proceedings before the tribunal. By considering the context in which the relevant provision appears, the AAT concluded that the "working out" of the GST payable occurs when the taxpayer accounts to the Commissioner for the GST payable. At [36] of the Second Tribunal Decision,

[19] *Cyonara Snowfox Pty Ltd and Commissioner of Taxation* (2010) 78 ATR 632; [2010] AATA 137 at [18]-[19].

the AAT stated:

> [T]he time at which one might ordinarily "work out" the amounts of GST would be expected to be at the time of accounting to the Commissioner, by means of a BAS, for the GST. In the context of s 75-5 of the GST Act, proceedings in the Tribunal do not involve "working out" the GST on a transaction, they involve a determination whether the objection decision made by the Commissioner was the correct or preferable one. The working out, in my view, is undertaken at the time when a taxpayer is required to account to the Commissioner for GST in accordance with the GST Act.

The tribunal pointed out an obvious difficulty with the taxpayer's argument, in circumstances where the recipient of the supply was registered for GST and most likely claimed an input tax credit in respect of the acquisition long before the taxpayer's purported decision to apply the margin scheme to the sale of the property. In this respect, the AAT stated at [39] of the Second Tribunal Decision:

> Cyonara's contention does not sit well with another aspect of the GST legislation, the allowance for input credits, that is, the offsetting of GST paid against GST payable. The purchasers of each of Lot 1 and Lot 9 were registered pursuant to Part 2-5 of the GST Act. Given that those purchasers were registered, or required to be registered for GST purposes, it may confidently be assumed that they claimed an input tax credit for the GST component of the settlement sum. Where the GST has been accounted for (and paid to the Commissioner) by the vendor, the allowance of an input tax credit has a balancing effect…

Consequently, the amounts of GST assessed by the Commissioner in respect of Lots 1 and 9 were confirmed by the tribunal.

GST-free supply of a going concern

Aside from the lack of documentary evidence provided by the taxpayer, as well as the lack of consistency in the evidence that was provided, the AAT found that that there was no lease in place in respect of Lot 8 when it was supplied to the purchaser as a lease could not be validly granted by the purchaser to the taxpayer prior to title having passed. In this respect, the AAT stated at [78] of the Second Tribunal Decision:

> I find it impossible to conclude that there could be a valid lease granted from 6 December 2005 and no authority was cited to me for such a proposition. At best for Cyonara, I would have thought that a lease in such terms would operate as a lease commencing from the time when the lessor first became able to grant a lease, that is, when legal title was conveyed to it.

The AAT's decision was not solely based on this conclusion. The tribunal did not accept the taxpayer's evidence in respect of the leases to the Swiss Group entities and Solartech, stating the following:

> Ultimately, it is not necessary to answer the interesting questions posed by this part of the transaction. That is so, in my view, because Cyonara fails to satisfy each of the requirements for the supply of a going concern. If the enterprise be regarded as being the leasing of Lot 8 (and no other enterprise was suggested), I am not satisfied that Cyonara carried on that enterprise until the day of supply. I am, indeed, not satisfied that it carried on the enterprise of leasing at any time within the period of many months prior to the day of supply. It was, at various times, attempting to obtain a tenant to take a lease but Cyonara did not suggest that the enterprise of leasing could be carried on merely by seeking to obtain a tenant.[20]

In reaching this conclusion, the AAT took into account that the taxpayer had not called any witnesses, such as Mr Hastings, who may have corroborated the evidence of Mr Smits. The Commissioner argued, and the tribunal accepted, that in those circumstances, a *Jones v Dunkel* ((1959) 101 CLR 298) inference should be drawn. While the taxpayer submitted that such an inference should not be drawn in circumstances where its evidence was not contradicted, and Mr Smits was not put on notice that his evidence was to be impugned, the AAT pointed out that the taxpayer's evidence (or lack of evidence) had been under attack by the Commissioner for some time, including in the Commissioner's objection decision,[21] and then stated as follows:

[20] *Cyonara Snowfox Pty Ltd and Commissioner of Taxation* (2011) 80 ATR 225; [2011] AATA 124 at [79].

[21] *Cyonara Snowfox Pty Ltd and Commissioner of Taxation* (2011) 80 ATR 225; [2011] AATA 124 at [59]-[61].

> There is no reason to doubt the operation of the principle in *Jones v Dunkel* in proceedings in the Tribunal, *a fortiori* in cases in the Taxation Appeals Division where the statute imposes on an applicant the burden of showing that the assessment was excessive.[22] I consider that it has been plain all along that the Commissioner was contending that Cyonara's evidence was insufficient to discharge its onus. Mr Smits is an experienced solicitor and was, throughout, represented by solicitors. It may be accepted that some dispute had arisen with the former solicitor which may have made it difficult to obtain documents from that solicitor voluntarily, however no attempt was made to use the summons power of the Tribunal to obtain relevant documents from either the former solicitor or any other relevant parties. The absence of relevant witnesses and documents was raised directly with Mr Smits in the witness box and what was implicit in the questioning was made explicit in the Commissioner's written submissions, exchanged with Cyonara in advance of the final day of the hearing. No application was made to adjourn the hearing to allow further witnesses to be called or documents to be obtained.[23]

The comments should be given due consideration by taxpayers who appear before the tribunal with a lack of documentary evidence, especially in emphasising that negative inferences will be drawn where taxpayers do not call upon relevant witnesses, do not attempt to use the summons power of the AAT and do not request extra time where it may assist in bringing the evidence together.

Time limit on recovery by the Commissioner

The AAT rejected the taxpayer's argument that the Notice of Assessment did not constitute a valid notice as it did not require payment for the correct amount. The bankruptcy cases referred to by the Commissioner were not considered relevant by the AAT as the relevant provisions of the *Bankruptcy Act 1966* (Cth) explicitly provide that a notice will be invalid if it overstates the amount due, whereas the TAA contains no equivalent provision. Consequently, the Commissioner was not prevented from recovering the amounts of GST under the Notice of Assessment on the basis that the statutory time period in s 105-50 of Sch 1 to the TAA had expired.

FULL FEDERAL COURT DECISION

The Full Court dismissed the taxpayer's appeal and, in doing so, made some illuminating comments as to how the taxpayer's onus of proof may be discharged in the AAT and whether the matters before the Federal Court should be properly characterised as questions of fact or questions of law. The reasons of the Full Court are discussed in detail below.

Margin scheme

The Full Court found that the AAT was correct in its construction of s 75-5 of the GST Act.[24] The Full Court stated that the "references in Div 75 to the making of a taxable supply 'under the margin scheme' suggests a supply *under* an *engaged* margin scheme", suggesting that the decision to use the margin scheme must be made prior to or at the same time as the making of the supply.[25] Like the AAT, the Full Court considered the context of the provision and referred to the "statutory purpose" as follows:

> Section 755 has a clear purpose of providing a supplier with a choice of a *method* of calculating or "working out" the amount of GST payable in making a taxable supply of real property that avoids the unfairness of the amount of GST being worked out on the whole of the supply price where no input tax credits arise on the upstream acquisition, with a view to providing for the calculation of the GST on only the margin as described at [36] of these reasons. The section is directed to a facultative methodological calculation in *making* a taxable supply, if the taxpayer chooses to engage the calculus of the method *when* making the taxable supply…[26]

The Full Court also referred to subsequent amendments to s 75-5 of the GST Act in support of its conclusions. Under the *Tax Laws Amendment (2005 Measures No 2) Act 2005* (Cth), s 75-5 was

[22] See eg *Re Optimise Group Pty Ltd & Commissioner of Taxation* (2010) 53 AAR 117.

[23] *Cyonara Snowfox Pty Ltd and Commissioner of Taxation* (2011) 80 ATR 225; [2011] AATA 124 at [63].

[24] *Cyonara Snowfox Pty Ltd v Commissioner of Taxation* [2012] FCAFC 177 at [93].

[25] *Cyonara Snowfox Pty Ltd v Commissioner of Taxation* [2012] FCAFC 177 at [96].

[26] *Cyonara Snowfox Pty Ltd v Commissioner of Taxation* [2012] FCAFC 177 at [93].

amended so as to include a requirement that the margin scheme can only be applied in respect of a supply of real property in circumstances where the supplier and recipient agree in writing that the margin scheme is to apply, either on or before the making of the supply or within such further period as the Commissioner allows (see s 75-5(1A) of the GST Act). The amended provision applies to supplies taking place on or after 17 March 2005. The Full Court took the view that the amendments as to the timing of the decision to apply the margin scheme only clarified what was already the case under the law. In this respect, their Honours stated:

> Under the amended form of s 755, the use of the margin scheme must be agreed in writing between the supplier and the recipient of the supply. The vice addressed by the amendment and the adoption of the new provision are both consistent with an underlying notion that the margin scheme, if it is to apply, was and is to apply at least by the date of supply, being the date of settlement…[27]

Consequently, the taxpayer failed in its argument that it was still open to it to choose to apply the margin scheme in respect of Lots 1 and 9.

GST-free supply of a going concern

The Full Court dismissed the appeal in respect of the going concern issue on the basis that the contentions raised by the taxpayer on this ground did not relate to a question of law and "rise no higher than an attempt to re-agitate the merits of the factual findings".[28] In reaching this conclusion, the Full Court provided a detailed analysis of the difference between questions of law and questions of fact, including where the two may seem interconnected. In this regard, the Full Court stated the following:

> An appeal (or more properly put, an application in the original jurisdiction) lies from a decision of the Tribunal to this Court "on a question of law" and once properly arising (and properly framed) that question (including other questions of law) is the *subject matter* of the appeal. This narrow sense in which an appeal from a decision of the Tribunal lies to the Federal Court is entirely consistent with a statutory intention to limit the Court's review of factual findings. Moreover, a mixed question of law and fact is not "a question of law" within the meaning of s 44(1) of the AAT Act.
>
> Of course, a determination of a question of fact by the Tribunal may give rise to "a question of law". Some examples are whether the Tribunal has *identified* the relevant legal test to be applied; whether the Tribunal has *applied* the correct test even if the reasons suggest that the correct test has been identified; whether there *is evidence* to support a finding of fact; whether facts found fall *within* the statutory provision; and whether the Tribunal has adopted a *manner* of decision making which fails to discharge its "obligations according to law".[29]

The Full Court found that the AAT's findings of fact were open to it on the evidence.

The taxpayer had also appealed the decision on the grounds that the principles in *Jones v Dunkel* should not have applied in respect of the taxpayer, but should have applied in respect of the Commissioner, who did not call any evidence that contradicted the taxpayer's case.[30] The taxpayer also argued a number of other grounds in relation to the AAT's handling of the evidence, including that the tribunal wrongly required corroboration of the evidence of Mr Smits, wrongly rejected the uncontradicted evidence of Mr Smits and should have applied the rule in *Browne v Dunn* ((1893) 6 R 67 HL) against the Commissioner on the basis that the evidence of Mr Smits was not impugned until the close of evidence.[31]

The taxpayer's contentions led the Full Court to outline, in some detail, why the taxpayer failed in discharging its onus of proof before the AAT. Their Honours emphasised that oral evidence, even if not contradicted by the evidence of the Commissioner, will not persuade the tribunal that a taxpayer has discharged its onus of proof in circumstances where the documentary evidence is lacking. Their

[27] *Cyonara Snowfox Pty Ltd v Commissioner of Taxation* [2012] FCAFC 177 at [95].

[28] *Cyonara Snowfox Pty Ltd v Commissioner of Taxation* [2012] FCAFC 177 at [118].

[29] *Cyonara Snowfox Pty Ltd v Commissioner of Taxation* [2012] FCAFC 177 at [112]-[113].

[30] *Cyonara Snowfox Pty Ltd v Commissioner of Taxation* [2012] FCAFC 177 at [87].

[31] *Cyonara Snowfox Pty Ltd v Commissioner of Taxation* [2012] FCAFC 177 at [87].

Honours stated:

> The Tribunal… is not bound to accept Mr Smits's evidence as determinative of the question in issue and Cyonara cannot necessarily discharge its persuasive burden by Mr Smits simply "swearing the issue". The proof of the issue is made good in discharge of the dispositive burden by Cyonara adducing evidence that satisfies the Tribunal, on the balance of probabilities, that such a lease was entered into, for the relevant term, on particular conditions. The Tribunal was confronted with a contention as to three earlier leases only one of which was put into evidence, and the later critical executed Solartech lease was not put into evidence at all.
>
> The discharge of Cyonara's burden before the Tribunal is not made good simply as a function of a director giving oral narrative evidence of a contended fact (without producing to the tribunal of fact the central document that speaks to critical aspects of the matter in issue), on the contended footing that oral narrative evidence must be persuasive because the Commissioner has not adduced evidence to contradict the director's oral evidence.[32]

In respect of the *Jones v Dunkel* principles, their Honours noted that the AAT reached its decision independently of any inferences drawn from the taxpayer's decision not to call other witnesses, but that as the taxpayer bore the onus of proving the Commissioner's assessment was excessive, "it was more 'natural' for Cyonara to take steps to bring the absent evidence consisting of the particular witnesses and the document before the Tribunal".[33]

Time limit on recovery by the Commissioner

The Full Court affirmed both the First and Second Tribunal Decisions. In respect of the First Tribunal Decision, their Honours agreed with the AAT in finding that a taxpayer's liability is not dependent on or affected by an assessment (s 105-15 of Sch 1 to the TAA) and that a *notice* of assessment still constitutes a notice for the purposes of s 105-50 of Sch 1 to the TAA. The notice of assessment notifies the taxpayer of the assessment, but the liability is determined with reference to the provisions of the GST Act.[34]

The Full Court also agreed with the conclusions in the Second Tribunal Decision in finding that the Commissioner's overstatement of the GST payable on the Notice of Assessment did not invalidate it as a notice for the purpose of s 105-50. Their Honours agreed with the AAT's conclusion that there is no relevant analogy with bankruptcy notices as there is no equivalent provision in the GST Act to the provisions in the *Bankruptcy Act* that provide that a notice (in some circumstances) will be invalidated by reason that the specified sum exceeds the amount actually due. Their Honours stated at [135]:

> It would be an odd result if a Notice of Assessment and thus a notice for the purposes of s 105-50(3)(a) was rendered invalid in respect of every aspect of its content at the date of issue, by reason of the Commissioner's assertion in the Notice of Assessment that an amount of unpaid GST was payable which is later shown not to have been payable at the issue date, or is otherwise conceded by the Commissioner, at a later date, not to have been payable at the date of issue.

Consequently, the Notice of Assessment was a valid notice for the purposes of s 105-50 and, therefore, the Commissioner had not exceeded the statutory time period for recovering the GST.

PENALTIES

No issues in respect of penalties were decided by the AAT or the Full Federal Court. It was revealed in the Second Tribunal Decision that the only penalties imposed by the Commissioner were with reference to Lot 1 (September 2004 tax period) and Lot 10 (October 2006 tax period), in respect of which the taxpayer remitted no GST to the Commissioner prior to the audit and the issuing of the Notice of Assessment, notwithstanding that the documents show that amounts of GST were recovered from the purchasers of those lots.

[32] *Cyonara Snowfox Pty Ltd v Commissioner of Taxation* [2012] FCAFC 177 at [106]-[107].

[33] *Cyonara Snowfox Pty Ltd v Commissioner of Taxation* [2012] FCAFC 177 at [117].

[34] *Cyonara Snowfox Pty Ltd v Commissioner of Taxation* [2012] FCAFC 177 at [173]-[174].

The penalty amount ultimately imposed by the Commissioner was 50%, reduced by 80%, with the amount in respect of Lot 10 then remitted by 50%.[35] In the circumstances, given that no GST was remitted in respect of those supplies and the taxpayer's complete lack of documentary evidence to support its contentions as to the GST-free supply of the going concern, it is curious that the penalty amounts are relatively insignificant. Either the Commissioner was feeling very generous, or there are other facts that influenced the Commissioner' approach that were not brought to light in the AAT and the Full Federal Court decisions.

CONCLUSION

The taxpayer, as noted above, has applied for special leave to appeal to the High Court of Australia. Time will tell whether any of the unusual arguments find favour with the judges of the High Court. Regardless of that outcome, the case is instructive for tax professionals who have carriage of GST litigation matters.

[35] *Cyonara Snowfox Pty Ltd and Commissioner of Taxation* (2011) 80 ATR 225; [2011] AATA 124 at [23], [93].